MERGERS & ACQUISITIONS 4: LOIs, MOUs and TERM SHEETS: DEAL POINTS

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I. Executive Summary

This is the fourth of our series of expanded and updated advisories on Mergers & Acquisitions (M&A). Like the first three in the series, "Mergers & Acquisitions 1: Overview and Transaction Types" (**M&A 1**), "Mergers & Acquisitions 2: Tax Structuring Considerations" (**M&A 2**) and "Mergers & Acquisitions 3: Structuring Payment (**M&A 3**), it is meant to offer to business executives and their professional advisers an M&A guide both accessible and of practical use when embarking on an M&A transaction in their own business. This advisory will discuss Letters of Intent (LOIs), Memoranda of Understanding (MOUs) and Term Sheets, collectively called here the "Preliminary Documents" to a transaction that can set the parameters and tone for the entire transaction that follows and give significant advantages either party, whether Acquirer or Target. All advisories in the series will be available on our website at **Kurtin PLLC Mergers & Acquisitions**.

Following the discussion in each advisory in the series are "Deal Points" on considerations in the purchase or sale of a business that we often raise when we handle these types of transactions for our clients: what to do, and *what at all costs not to do*. Future editions in the series will drill down on issues like principal transaction documents (Stock Purchase Agreements, Asset Purchase Agreements and Merger Agreements); securities law considerations, especially when public reporting companies under the Securities Exchange Act of 1934 (the "Exchange Act") are parties to the M&A transaction and there is a substantial federal securities law regulatory compliance overlay to the transaction (Public M&A); antitrust (competition) law issues, which are likely to change substantially in 2025 as a result of the U.S. presidential election this month; financing the M&A transaction; foreign investment review and technology export rules; employment and equity-based compensation; Cross-border M&A (where Acquirer and Target are domiciled in different countries); due diligence and corporate governance; and industry-specific regulatory regimes. A progressively cumulative glossary of defined technical terms used will appear at the end of each advisory in the series.

II. How MOUs, LOIs and Term Sheets are Similar and How They Differ

We're going to put in a good word for MOUs, LOIs and Term Sheets here. They're often treated almost as throw-away documents, not so much in Public M&A, in which the Targets are public reporting companies under the Exchange Act, and in which the deals tend to be bigger and are more regulated by the securities regulations (an upcoming edition in this series will review Public M&A and those issues, but certainly in mid-market private Target M&A deals. Why the frequent contempt for them? Preliminary Documents are often a good way to lock down deal terms before the counterparty may have really focused on them. They serve to frame the prospective M&A transaction and, even when they are not binding, exert some "moral force" in subsequent negotiations; when a Preliminary Document deals with a transaction issue, it is that much harder for one party to suddenly repudiate that agreement and insist upon another resolution for that issue while otherwise proceeding with the transaction. When done attentively, and not as a throw-away afterthought, a Preliminary Document almost always reduces overall transaction costs by framing the transaction and exposing what issues the parties agree about and need not spend much time on, versus issues that are really ISSUES, and which require negotiation and resolution.

More subtly, a Preliminary Document can expose what issues are "core" – critical – issues for each party. Core issues are often asymmetrical between the parties; a given issue may be a core issue for one party but irrelevant, or nearly so, for the other, providing a negotiating edge when a party realizes the asymmetry, and that a concession that the counterparty needs to have in the transaction can be readily made – in exchange for some other consideration that the party needs itself. A well-negotiated Preliminary Document can be the first thing in a transaction to reveal not only issues of contention but expose those kinds of asymmetries issues that can provide a negotiating edge later. A Preliminary Document almost always more than pays for itself – literally – in the reduction of subsequent and overall transaction costs. A Preliminary Document also forces the real decision-makers in both Acquirer and Target to focus on the transaction early on, since the commitments made in the Preliminary Document – even if not formally binding – require the decision-maker's sign-off before going in the document. A transaction commenced with a negotiated MOU, LOI or Term Sheet is, simply put, a transaction that is more likely to be successfully and efficiently closed.

Yet, despite all that, Preliminary Documents are often treated as throw-away documents requiring virtually no thought or strategy, since they are often non-binding and consequently viewed as

unimportant. They are quickly drafted, often by company personnel who don't have the authority to make binding commitments. They also often give the parties the illusion of having "accomplished something" without the reality of it. Treating Preliminary Documents that way begs the obvious question: if Preliminary Documents don't really matter, why do them at all? Why not skip them, and immediately move to drafting the principal M&A transaction documents, the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement and the ancillary documentation that go with them? In fact, some parties do just that. Whether it happens to come back and bite them or not, it is almost always a mistake. Put bluntly, in M&A and other high-level corporate/commercial transactions other than the simplest, a deal attempted without a thought-out MOU, LOI or Term Sheet is usually amateur hour and often encounters road blocks later on that could have been avoided at the outset.

There are some identifiable distinctions among MOUs, LOIs and Term Sheets, but they almost don't matter because hardly anyone can tell anyone else what they are anymore, and the terms are often used for one of the other types of documents. Here are the basic distinctions, in this writer's opinion. A Memorandum of Understanding, generally in memorandum form (no surprise), is the least formal, most preliminary, most aspirational type of Preliminary Document. It is used in many non-M&A commercial transactions, and often expresses the most basic intent to pursue a corporate or commercial relationship. Not surprisingly, MOUs are often the least binding type of Preliminary Document; the "Understanding" part of the title is the tip-off. They are also probably the type that most often gives the illusion of advancing the ball without having really done anything. Often, they don't amount to much more than saying "sure, we're potentially interested in a relationship on some basis. To be discussed." Is that worth doing? Sometimes it might be, to establish that the parties are talking, but the earth won't have moved. On the other hand, a well-thought-out MOU can set action items and milestones to be achieved by each party by set dates, upon which a more binding arrangement may become appropriate, even a second Preliminary Document like a Term Sheet. Used that way, the MOU can make a lot more sense. It's always a fair question to ask if a step in a transaction is really moving the ball forward, or just giving the illusion of doing so.

Letters of Intent are the arguably the next most formal; they are usually in letter form (no surprise), tend to give more specifics about not only what kind of corporate or commercial relationship is under consideration, but some actual specifics of the transaction that would bring that relationship into existence. Just as the word "Understanding" is the tip-off on the non-binding nature of most MOUs, the

word "Intent" is the tip-off for LOIs. Nevertheless, while many people would say there is no difference between MOUs and LOIs, in this writer's opinion, LOIs are more likely than MOUs to have at least some binding terms (see Part III below).

Term Sheets are arguably the most formal and structured of the three types of Preliminary Document and are often used in entrepreneurial transactions like venture capital or private equity deals; even though often not signed, they generally contain actual corporate and commercial terms (no surprise), such as type of transaction, acquisition structure; Acquisition Consideration or Merger Consideration details, such as what securities are to be issued in the transaction; milestones at which various obligations vest; and other terms.

III. Preliminary Document Main Negotiating Points

Following are the most significant items to be treated in most M&A Preliminary Documents, with discussion of under what circumstances they should be made binding or not.

a. Transaction Structure: The transaction structure, whether Stock Purchase, Asset Purchase or Merger, should be identified at the beginning of the Preliminary Document (see **M&A 1**). Whether any particular tax-free or tax-advantaged treatment for the transaction will be sought in the structuring should be identified in the Preliminary Document (see **M&A 2**).

b. Acquisition Consideration: How the Acquisition Consideration, or purchase price, is to be paid should be made clear at the Preliminary Document stage (see **M&A 3**). Is the Acquisition Consideration to be cash, stock, cash and stock, assumption of debt or some hybrid? Is stock to be issued by Acquirer to use as Acquisition Consideration? What will be the attributes/privileges of stock issued for the transaction: common stock, preferred stock or convertible preferred stock (liquidation, conversion, redemption privileges, registration rights in the case of a public offering, etc.)? Is an existing class of stock to be used, or will a new class be authorized? If the Acquisition Consideration is a mix of cash and stock, is there a cash election for the Target shareholders? Is any third-party financing to be obtained by Acquirer? What type of financing is to be obtained, and to what extent will the transaction be contingent on that financing being obtained?

c. Expected Post-Closing Capitalization: A pro forma expected post-closing capitalization table is often included in the Preliminary Document, showing, in purely financial terms, the intended rationale for the M&A transaction.

d. Definitive or Principal Documentation: In nearly any M&A transaction, there will be a Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement as the principal deal document, but other documents will be needed in most transactions, such as investment agreements, financing documents (for stock issuance, incurring debt, etc.), security agreements, intellectual property license and assignment agreements, employment and equity-based compensation agreements (stock option or stock grants plans, etc.), real estate leases or conveyance documents and others. It is common for the need for new documentation not thought of at the Preliminary Document stage to emerge later in the transaction, but to the extent thought of, principal documentation and the responsibility for preparing it among the parties and their advisors, and by when, should be baked into the Preliminary Document.

e. Key Employee Lock-ups and Equity-Based Compensation: Often, key employees who will sign employment agreements with the post-transaction company (not always necessary when Target is the Surviving Entity) and the terms of employment are included, as are stock option or other stock rights plans for selling Target or other shareholders.

f. Board, Officer and Committee Representation: Often the Preliminary Document will set out post-closing Surviving Entity Board representation as between Acquirer and Target, Officer positions and representation on Surviving Entity committees.

g. Due Diligence: Due diligence, the scope of the parties' disclosures to each other before the M&A transaction closes, should be outlined in the Preliminary Document. When the transaction has a clear Acquirer and a clear Target, as a general matter most of the due diligence is sought by Acquirer of Target information. However, in a "merger of equals" scenario, discussed in **M&A 3** as often featuring "Fixed Exchange" ratios of stock-for-stock Acquisition Consideration, both parties may have equal need to do due diligence on each other. The same will be true when Target shareholders will become Acquirer shareholders as a result of the transaction; they will want due diligence information on the company whose shares they will be receiving in exchange for their existing Target shares. Target shareholders who are receiving cash are typically less

concerned with due diligence on Acquirer. Due diligence issues in a Preliminary Document will frequently be mentioned but otherwise pitched out to a "due diligence checklist," in which the items required to be produced by each party are set forth.

h. Information Rights: Information rights for Surviving Entity shareholders are often set forth in the Preliminary Document, especially for private companies not issuing Exchange Act periodic reports.

i. Confidentiality: Confidentiality as to due diligence production and other information exchanged between the parties is often one of the most critical issues at the Preliminary Document stage and one of the most frequently sought to be binding on the parties. In fact, confidentiality provisions don't really make sense unless they ARE contractually binding. The parties frequently enter into confidentiality agreements or non-disclosure agreements (NDAs) concurrently with the Preliminary Document that specify the terms of confidentiality and its binding nature. Confidentiality provisions, whether in the Preliminary Document itself or in an NDA, are often significantly negotiated as to scope of confidentiality (what information to be exchanged by the parties is to be treated as confidential); duration of the confidentiality treatment of the disclosed information, including in the case of the transaction terminating and not closing; officers, employees and outside advisors (attorneys, accountants, financial advisors, etc.) of each party who will have access to the confidential information for purposes of due diligence and completing the transaction and under what circumstances and facilities the confidential information will be made available for those purposes (physical or virtual "deal rooms," etc.); and under what circumstances the confidentiality obligation will be relieved (expiration of confidentiality period, third party publication or disclosure, need to respond to a judicial or administrative subpoena, etc.).

j. Exclusivity: Are there exclusivity rights to complete the transaction during a certain period, without interference by third parties? Are there "No Shop" or "Go Shop" provisions affecting the exclusivity of the relationship between the time the Preliminary Document is entered into and the principal documentation? If the Preliminary Document provides for exclusivity, the extent, duration and other issues should be set forth, as well as any carve-outs or exceptions to exclusivity when consideration of a competing offer is required by Target's directors and officers in the exercise of their fiduciary duties (for example, the "fiduciary out," to be discussed in a

future edition). Exclusivity, like Confidentiality, only makes sense if it is made contractually binding, so the scope, duration and other aspects of exclusivity should be set out in the Preliminary Document.

k. Conditions to Closing: Upon the fulfillment of what conditions will Acquirer or Target be obligated to close the transaction? The failure to occur of what conditions may excuse a party from closing?

l. Representations, Warranties and Covenants: The most important representations, warranties and positive and negative covenants by either party often appear in the Preliminary Document. These will invariably be repeated and expanded upon in the Stock Purchase Agreement, Asset Purchase Agreement or Merger Agreement, as the case may be.

m. Indemnification Rights: Under what circumstances will a post-closing event or discovery, whether disclosed or not, require indemnification by the other party? Indemnification rights are more common in private company M&A than in Public M&A.

n. Regulatory Approvals: are any federal, state, local or non-U.S. governmental or regulatory approvals required for the transaction outlined in the Preliminary Document needed to the transaction to close? By when must they be obtained, and whose responsibility is it to do so? What are the consequences of failing to obtain regulatory approvals, bearing in mind that doing so is not fully in the responsible party's control? Are there foreign investment or foreign ownership issues? Are there technology export issues? Are there Foreign Corrupt Practices Act or money laundering issues? Do licenses need to be obtained or assigned from Target to Acquirer, or the need for them waived? Often, the need for regulatory approvals are the biggest cause for delay in closing a transaction after signing the principal transaction document or even in one terminating without closing. The Preliminary Document is a good place to memorialize the issue and plan it – the timing of getting the approvals, the party whose responsibility it is to do so, etc. - so that it doesn't come as a surprise to either party mid-transaction.

o. Major Contracts and Third-Party Consents: Major Contracts may materially affect deal value, and like regulatory approvals, may require third party approvals not completely within the

parties' control. The Preliminary Document is also a good place to plan for dealing with major contracts, what third party consents are needed, and whose responsibility it is to obtain them.

p. Termination and Break-up Fees: If one or both parties cannot close the transaction, for example for failure to obtain financing or a critical regulatory or third-party approval, or there is delay beyond a certain point in doing so, how is it to be handled? The Preliminary Document should plan for those contingencies to the extent known by addressing under what circumstances the transaction can be terminated and whether and under what circumstances the terminating party may have the right to a "break-up" or termination fee from the other party to compensate for the time and money spent working on the transaction, foregoing discussions with other Sellers or Acquirers, and so forth. Termination provisions will feature more prominently in the principal transaction documents but should be dealt with in the Preliminary Document to the extent necessary to cover the period before the principal transaction documents are signed.

IV. Deal Points

Deal Point No. 1: Don't sneer at the LOI, MOU or Term Sheet. We made this clear before: don't blow off the Preliminary Document. As often as not they embody the *de facto* or even binding structure of the deal, and advantages casually given away by treating the LOI, MOU or Term Sheet as a low-level document not requiring serious attention may never come back. Even when not binding, the Preliminary Document often exerts "moral force" in subsequent negotiations that make its agreements difficult to renegotiate, so it's a smart move to think them through at the Preliminary Document stage.

Deal Point No. 2: Plan Acquisition Consideration and its structure at the Preliminary Document stage. Nobody, especially on the Target – sell side, wants to hear about a change in purchase price after the deal is signed up and before closing. When a potential Acquisition Consideration-altering event is identified and its risk is allocated in preliminary documentation (for example, a fiduciary out event, a valuation surprise or a financing contingency), the occurrence of such an event is accounted for and should not give rise to disputes.

Deal Point No. 3: Think about core issues at the Preliminary Document stage. Do Target/Target shareholders want to cash out? Or do they want to participate in the post-closing business? Will using Acquirer's stock dilute Acquirer's capital structure and limit strategic options going forward, or impair

Acquirer's existing shareholders' interests? What is the "cheapest" price to pay, cash, stock or assumed debt? Can an Acquisition Consideration decision solve a particular need of Target/Target shareholders or Acquirer/Acquirer shareholders?

Deal Point No. 4: Don't break the camel's back in negotiations; find a counterparty insider as your Sherpa. Identify those counterparty core issues. Find a counterparty corporate insider to guide you on what the other side's core needs in the transaction are, what issues it can yield on, and what it can't. Everybody wants a good deal, a competitive deal, a market or better-than-market deal. But we've seen many clients and counterparties, especially those who had the edge in bargaining power, negotiate so hard for the last dollar or concession based upon that edge that a transaction that both sides initially wanted blew up. It's key to have a hierarchy not only of your own critical deal points, to know what you can give ground on and what you can't, but to have a good idea of the same critical and less critical deal considerations for your counterparty. If you know that a given issue is critical to the other party but not to you, you can accede to the other party's needs in exchange for some of your own. That's not weakness; that's smart negotiating to get your deal across the finish line.

Owen D. Kurtin

About Us

Kurtin PLLC is a New York City-based law firm founded in 2008 and celebrating its 16th anniversary this year. Our practice focuses on corporate, finance, commercial and regulatory representation for both mature and early stage companies, investment funds, investors and lenders in the Biotechnology & Life Sciences, Communications & Media, Information Technologies & Internet, Satellites & Space, and Venture Capital & Private Equity sectors. Among our key values, none rank higher than creative and individualized solutions to business issues, absolute client discretion and unsurpassed responsiveness. Since our founding, we have represented clients in over 40 countries on six continents and across the United States on transactional and dispute resolution matters.

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Mergers & Acquisitions: Deal Points
Cumulative Glossary
Appendix 1

1. **Acquirer (or Acquirer, Buyer or Purchaser):** the purchaser, or "buy side" party in an M&A transaction, whether an Asset Purchase or a Stock Purchase, which acquires all or the majority of the stock or assets of another business. In a Merger, the parties are not technically purchaser or seller, but when one party is clearly the dominant party in the transaction, and is often the Surviving Entity (though not always, as in the case of a Reverse Merger), that party can be thought of as the Acquirer.

2. **Acquisition Consideration:** the purchase price paid by Acquirer to Target in an M&A transaction, whether in cash, stock, assumed debt or a combination thereof.

3. **Asset Purchase:** a transaction by which one party to an M&A transaction purchases all or the majority of the assets of another party. Distinguished from a sale by Target in the ordinary course of business, as in selling a part of its inventory, or surplus equipment not needed for continuing its business operations.

4. **Asset Purchase Agreement:** a contractual agreement serving as the principal document by which an Asset purchase is effected.

5. **Cash Election Merger:** an M&A transaction in which Target shareholders are granted an election period to decide whether to accept stock or cash as all or part of the Acquisition Consideration.

6. **Cross-border M&A:** M&A transactions in which Acquirer is domiciled in one country, and Target in another country. For purposes of this M&A: Deal Points series, one of those countries in which either Acquirer or Target is domiciled is the United States.

7. **DGCL:** the Delaware General Corporation Law, serving as a paradigm corporation statute in the U.S., and frequently the basis of incorporation by U.S. companies, wherever physically based, that intend to do business across the U.S. as well as inbound subsidiaries of non-U.S. companies wishing to have operations in the U.S.

8. **Due Diligence:** the scope of the parties' disclosures to each other before the M&A transaction closes, generally buttressed by deal protections in the form of warranties, representations, covenants and linked rights of indemnification, termination, conditions to closing and others.

9. **EBITDA:** Earnings Before Interest, Taxes, Depreciation and Amortization, a common accounting metric.

10. **Exchange Act:** the Securities Exchange Act of 1934, as amended, governing resales of already-issued securities, both debt and equity, and the periodic reporting obligations of publicly registered companies.

11. **Fixed Exchange Ratio:** Where not all the Acquisition Consideration is in cash, parties can also allocate risk of pre-closing volatility through adjustable pricing formulas. In a Fixed Exchange Ratio, each of Target's shares is converted into a fixed number of Acquirer's shares based on a negotiated and fixed exchange ratio. Under a Fixed Exchange structure, the dollar value of the fixed number of Acquirer shares received by Target/Target shareholders can rise or fall in the period after the deal is signed and when it closes, thereby changing the value of the Acquisition Consideration, either as a result of Acquirer's business performance, market reaction to the pending deal, or general market/industry conditions incidentally affecting Acquirer. Fixed Exchange Ratios are most common in larger, stock-for-stock "merger of equals" transactions, since both parties share the risk of movement in Acquirer's share price. Fixed Exchange Ratio transactions are also traditionally common in sectors of perceived volatility, such as the tech sector, and Acquirer's resulting position that volatility risk in its stock price should be shared.

12. **Fixed Value Ratio:** In a Fixed Value Ratio transaction, the exchange ratio that floats and Target shareholders receive a fixed dollar value of Acquisition Consideration, however many Acquirer shares that works out to cost. The formula usually provides for measuring Acquirer's stock price during a negotiated period of days or weeks prior to closing or a meeting of Target's stockholders to approve the transaction. A Fixed Value pricing formula is used to insulate Target's shareholders from risk from changes in Acquirer's share value prior to closing, whether from the Acquirer's business performance, market reaction to the pending deal, or general market/industry conditions incidentally affecting Acquirer. Fixed Value Ratio transactions are traditionally most common when one party is clearly

Acquirer and the other clearly Target, rather than in the "merger of equals" context and, unlike in Fixed Exchange Ratio transactions, pose the risk for Acquirer that it may have to issue more shares to purchase Target's shares if Acquirer's share value declines during the measuring period, which may reduce the stock value and dilute existing Acquirer shareholders (of course, a rise in Acquirer's stock value prior to closing will allow it to close the transaction on fewer shares). Also, in Public M&A, hostile bidders often use Fixed Value Ratio structures because they have more appeal for Target shareholders, who may be solicited under a tender offer and are more likely to tender based on a known dollar compensation for their shares.

13. **IRS:** the Internal Revenue Service, the U.S. federal tax regulatory and enforcement agency.

14. **JV:** Joint Venture. JVs usually imply a formal collaboration short of merger or acquisition between two or more enterprises through a newly formed business entity or contract, as opposed to "Strategic Alliances," which usually involve two or more parties working to achieve a specific goal of mutual interest while remaining independent.

15. **LLC:** a limited liability company organized under a state's LLC statute, generally offering the limited liability protection for shareholders of corporations with the "pass-through" taxation of partnerships (i.e., not taxed at the LLC level, but taxable income or loss is "passed through" to the owners, called "members," equivalent to a corporation's shareholders). Also usually featuring less burdensome management and governance costs and formalities than equivalent corporations.

16. **LP:** a limited partnership under a state's limited partnership statute (usually modeled on the Uniform Limited Partnership Act), generally offering the limited liability protection for shareholders of corporations with the "pass-through" taxation of partnerships (i.e., not taxed at the LP level, but taxable income or loss is "passed through" to the limited partners, equivalent to a corporation's shareholders). Also usually featuring less burdensome management and governance costs and formalities than equivalent corporations.

17. **M&A:** generally used abbreviation for "Mergers & Acquisitions," a catch-all term sweeping up Stock Purchases, Asset Purchases and Mergers, all involving the legal or *de facto* acquisition of all or a majority of one business's stock or assets by another business.

18. **Merger (or Statutory Merger):** a process set forth in the company law statutes of the individual states by which two companies merge with each other, leaving one company or its subsidiary as the Surviving Entity, while the other company merges into that company or its subsidiary and ceases to exist as a separate legal entity.

    a. **Direct Merger:** A Merger structure in which Target merges directly into Acquirer, which is the Surviving Entity, while Target ceases to exist.

    b. **Reverse Merger:** A Merger structure in which Acquirer merges into Target, which is the Surviving Entity, while Acquirer ceases to exist.

    c. **Forward Triangular Merger:** A Merger structure in which Acquirer forms a subsidiary (**Merger Sub**) (or uses a pre-existing subsidiary), Target merges into Merger Sub, Merger Sub is the Surviving Entity and a subsidiary of Acquirer, while Target ceases to exist.

    d. **Reverse Triangular Merger:** A Merger structure in which Merger Sub merges into Target, Target is the Surviving Entity and becomes a subsidiary of Acquirer, while Merger Sub ceases to exist.

    All of these Merger structures are diagrammed in **M&A 1**.

19. **Merger Agreement (or Agreement and Plan of Merger):** a contractual agreement serving as the principal document by which a Merger is effected.

20. **Merger Consideration:** the Acquisition Consideration in a Merger.

21. **Preliminary Document: (MOU, or Memorandum of Understanding; LOI, or Letter of Intent; or Term Sheet. Also, NDA, or Non-Disclosure Agreement, which may be part of an MOU, LOI or Term Sheet or a standalone Preliminary Document):** forms of preliminary documentation used to set a framework for an M&A transaction and confidentiality before executing documents like an Asset Purchase Agreement or Stock Purchase Agreement. Some terms in preliminary documentation may be binding on the parties for a certain period, for example confidentiality or exclusivity, while others are

usually not binding.

22. **Public M&A:** M&A transactions involving a Target that is a public reporting company under the Exchange Act, requiring a substantial Exchange Act and SEC regulatory overlay of requirements for the transaction.

23. **SEC:** the Securities and Exchange Commission, the U.S. federal securities regulator.

24. **Securities Act:** the Securities Act of 1933, as amended, governing initial issuances of securities, both debt and equity.

25. **Stock Purchase:** a transaction by which one party purchases all or the majority of the stock of another party. Distinguished from a minority investment by one party in the other, such as a typical venture capital investment, which is not an M&A transaction.

26. **Stock Purchase Agreement:** a contractual agreement serving as the principal document by which a Stock Purchase is effected.

27. **Surviving Entity:** the company that continues its corporate existence and operations following a merger, or the company (Acquirer, Target or other depending on the transaction structure) that continues its existence with the assets and/or stock of the acquired company.

28. **Target (or Seller):** the seller, or "sell side" party in an M&A transaction, whether an Asset Purchase or a Stock Purchase, which sells all or the majority of its stock or assets to another business, the Acquirer. In a Merger, the parties are not technically purchaser or seller, but when one party is clearly the less dominant party in the transaction, and is often the merged party (though not always, as in the case of a Reverse Merger or Reverse Triangular Merger, that party can be thought of as the Target.

29. **Tax Code:** the U.S. Internal Revenue Code, 26 U.S.C.

30. **TCJA:** the Tax Cut and Jobs Act of 2017.